Tan Chong Keat v Asia Commercial Finance (M) Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO P-03-75 OF 1996
SHAIK DAUD, SITI NORMA YAAKOB AND DENIS ONG JJCA
17 APRIL 2000

Bankruptcy *— Notice — Application to set aside — Settlement agreements to withhold from enforcing judgment sum for one year — Whether creditor estopped from enforcing judgment sum by way of bankruptcy proceedings*

In August 1988, the respondent entered judgment against the appellant. In July 1990, in an effort to settle the judgment sum, the parties executed two settlement agreements. On 15 January 1993, the respondent issued a bankruptcy notice against the appellant demanding the balance of the judgment sum. The appellant filed an application to set aside the bankruptcy notice pursuant to r 95 of the Bankruptcy Rules 1969 wherein he averred that he had a counterclaim, set off or cross demand against the amount claimed by the respondent on the basis that the second settlement agreement served as a settlement of the sum due on the judgment sum. The application was dismissed by the senior assistant registrar and confirmed by the trial judge. The appellant appealed. The issue raised was whether the respondent who had entered into the two settlement agreements either in its own name or through a related company was estopped from enforcing the judgment sum by way of bankruptcy proceedings.

Held, dismissing the appeal:

As a creditor, it stands to reason that the respondent must be assured of its right to claim the balance of the judgment sum due from the appellant. That had been taken care of by cl 1 of the second settlement agreement wherein the appellant had agreed to the respondent withholding from enforcing the judgment sum for a year from the date of the first settlement agreement but after that period, the respondent was free to take any action it deemed fit to recover the balance of the judgment sum. As such, during the time bar of one year, the respondent's right to enforce payment of the judgment sum had been in abeyance but once the time bar has expired, his right to go against the appellant personally is revived. Under these circumstances, the appellant could not take any objection to the issue of the bankruptcy notice by relying on the existence of the two settlement agreements to say that he has a counterclaim against the amount demanded in the bankruptcy notice. Neither can the appellant claim that the respondent was estopped from issuing the bankruptcy notice as by agreement the appellant had consented to effect part settlement within a year and after that period the respondent was free to take any action against the appellant to recover the balance of the judgment sum (see p 253C–F).

A [**Bahasa Malaysia summary**

Pada Ogos 1988, responden memasuki penghakiman terhadap perayu. Pada Julai 1990, di atas usaha untuk menyelesaikan jumlah penghakiman, pihak-pihak telah melaksanakan dua perjanjian penyelesaian. Pada 15 Januari 1993, responden telah mengeluarkan B notis kebankrapan terhadap perayu menuntut baki jumlah penghakiman. Perayu telah memfailkan suatu permohonan untuk mengetepikan notis kebankrapan menurut k 95 Kaedah-Kaedah Kebankrapan 1969 di mana beliau menegaskan bahawa beliau mempunyai tuntutan balas, tolakan atau tuntutan bersilang terhadap C jumlah yang dituntut oleh responden di atas dasar bahawa perjanjian penyelesaian yang kedua berfungsi sebagai penyelesaian jumlah yang kena dibayar di atas jumlah penghakiman. Permohonan telah ditolak oleh penolong kanan pendaftar dan disahkan oleh hakim yang membicara. Perayu telah merayu. Isu yang dibangkitkan adalah sama ada responden yang telah memasuki dua perjanjian penyelesaian sama D ada di atas namanya sendiri atau melalui syarikat yang berkaitan diestop daripada menguatkuasakan jumlah penghakiman melalui prosiding kebankrapan.

E **Diputuskan**, menolak rayuan tersebut:

Sebagai pemiutang, adalah sesuatu yang munasabah bahawa responden mestilah pasti akan haknya untuk menuntut baki jumlah penghakiman yang kena dibayar oleh perayu. Ini telah diliputi oleh fasal 1 perjanjian penyelesaian yang kedua di mana perayu telah bersetuju kepada responden supaya enggan menguatkuasakan jumlah F penghakiman untuk setahun dari tarikh perjanjian penyelesaian yang pertama tetapi selepas tempoh tersebut, responden adalah bebas untuk mengambil sebarang tindakan yang dianggap sesuai untuk mendapat kembali baki jumlah penghakiman. Oleh itu, dalam tempoh halangan masa setahun, hak responden untuk menguatkuasakan G pembayaran jumlah penghakiman telah terbiar begitu saja tetapi selepas masa halangan telah luput, haknya untuk bertindak terhadap perayu secara peribadi telah dibangkitkan. Di bawah keadaan-keadaan berikut, perayu tidak boleh membangkitkan sebarang bantahan kepada isu notis kebankrapan dengan bergantung kepada H kewujudan dua perjanjian penyelesaian untuk mengatakan bahawa beliau mempunyai tuntutan balas terhadap jumlah yang dituntut di dalam notis kebankrapan. Begitu juga perayu tidak boleh mengatakan bahawa responden diestop daripada mengeluarkan notis kebankrapan oleh kerana dengan persetujuan perayu telah bersetuju untuk melaksanakan sebahagian penyelesaian di dalam masa setahun dan I selepas tempoh tersebut responden adalah bebas untuk mengambil sebarang tindakan terhadap perayu untuk mendapat kembali baki jumlah penghakiman tersebut (lihat ms 253C–F).]

Notes

For cases on application to set aside a bankruptcy notice, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1708–1724.

Legislation referred to

Bankruptcy Rules 1969 rr 18, 95

Appeal from: Bankruptcy No 29–40 of 1993 (High Court, Pulau Pinang)

Mahinder Singh Dulku (*Harjit Singh s/o Harban Singh* with him) (*Harjit Singh Sangay & Co*) for the appellant.

Khoo Guat Kim (*Chew Tan & Lim*) for the respondent.

Siti Norma Yaakob JCA (delivering judgment of the court): On 27 August 1988, the respondent entered judgment against the appellant and two others for the sum of RM567,922.24 and costs in Penang Civil Suit No 23–228–86. The appellant had guaranteed the payment of money due from the principal debtor, Polite Enterprise Sdn Bhd, of which the appellant was a director at the material time.

In 1990, in an effort to settle the judgment sum as well as other debts due to the respondent, two related companies of the parties representing their respective interests got together and executed two settlement agreements. The first is a sale and purchase cum joint venture agreement dated 22 June 1990 ('the first settlement agreement') entered into between Ever Point (M) Sdn Bhd ('Ever Point'), a related company of the appellant with Ladang Dahan Setia Sdn Bhd ('Ladang Dahan'), a related company of the respondent.

Under that first settlement agreement, Ever Point agreed to sell two pieces of land free of RM3.3m. In turn, Ladang Dahan undertook to develop the property into a housing estate with the net profits to be shared between them. The other terms of the first settlement agreement which are relevant are the arrangements to utilize part of the proceeds of sale amounting to RM2.5m to redeem the properties which had been charged to MUI Finance Berhad, with the balance of RM800,000 and the other benefits to be derived from the development of the property, to be assigned by Ever Point to the respondent for the purpose of setting part of the debts due to the respondent from a list of debtors whose names appear in the First Schedule to the first settlement agreement., Amongst that list is Polite Enterprise Sdn Bhd whose indebtedness stood at $1,006,178.77 and against whom judgment had already been entered together with the appellant.

In pursuance of the expressed intention to assign the balance of the proceeds of sale and the profit sharing of the joint venture as stated in the first settlement agreement, Ever Point executed the second settlement agreement with the respondent two weeks later wherein, Ever Point assigned all its rights and benefits under the first settlement agreement to the respondent.

That was on 4 July 1990, and two and a half years later, the respondent issued a Bankruptcy Notice, the subject matter of this appeal, dated 15 January 1993, against the appellant demanding payment of RM372,149.64, being the balance of the judgment sum. A credit for RM195,772.60 was given and that amount came from the balance of the proceeds of sale that was agreed to be paid out to the respondent under the terms of the first settlement agreement.

The appellant's response to the Bankruptcy Notice was to file two applications to have it set aside. The first is his affidavit affirmed on 2 September 1993, filed pursuant to r 95 of the Bankruptcy Rules 1969, ('the Rules') wherein he averred that he has a counterclaim, set-off or cross demand against the amount claimed by the respondent on the basis that the second settlement agreement serves as a settlement of the sum due on the judgment sum.

The second application is his summons in chambers dated 11 July 1994 filed under r 18 of the Rules and supported by his affidavit affirmed on 8 July 1994, wherein he relied on grounds other than the existence of a counterclaim, set-off or cross demand as averred to in his first application.

Both applications were heard by the senior assistant registrar who dismissed both applications and this was confirmed by the judge on appeal. We are now asked by the appellant to consider whether the latter decision has been correctly made.

In the court below, objections were taken as to whether:

(1) the appellant had raised a valid counterclaim in his first application filed pursuant to r 95 of the Rules. The trial judge found that there was no satisfactory proof to establish that the appellant had a counterclaim equal to or exceed the amount demanded in the bankruptcy notice.

(2) the bankruptcy notice had stated the exact amount due. The judge held this to be a non-issue as the bankruptcy notice is clear as to the amount of the appellant's indebtedness.

(3) the appellant's affidavit supporting his second application under r 18, contained grounds other than those stated in his affidavit filed under r 95. The trial judge held that no other valid grounds had been averred to in the affidavit in support.

(4) the judgment sum should be apportioned equally between the three defendants, against whom the judgment was obtained. Expressed in another way, the appellant should only be made to pay $^1/_3$ and not be held solely accountable for the full judgment sum. Again the trial judge held this objection to be a non-issue as the appellant, a guarantor for Polite Enterprise Sdn Bhd, had agreed that he would be solely responsible for settling the judgment sum as seen from the acknowledgement in the second settlement agreement.

None of the above objections were canvassed before us. Instead the one and only issue raised was whether the respondent, who had entered into the two settlement agreements either in its own name or through a related company

is estopped from enforcing the judgment sum by way of bankruptcy proceedings. A

The appellant contends that the two settlement agreements have the effect of suspending the respondent's legal right to enforce the judgment sum and as such the bankruptcy notice had been prematurely issued. In rebuttal the respondent maintains that whilst the second agreement makes ample provisions for settlement of the judgment sum, forebearance to enforce the judgment debt is limited in time in that such settlement had to be effected within a year of the date of the first settlement agreement. Since no settlement was reached within the time limited, the respondent's right to enforce the judgment is revived and there is therefore no question of the bankruptcy notice having been issued prematurely. B C

It is not disputed that both settlement agreements were executed for the sole purpose, inter alia, of satisfying the appellant's indebtedness to the respondent. This is clear from the language expressed at preamble (C) and cl 2.3(b) of the first settlement agreement and preambles (1), (2), (5) and (7) of the second settlement agreement.

However, the right of the respondent to execute the judgment sum is governed by the general provisions of preamble (3) of the second settlement agreement which reads as follows: D

> It is the intention of all parties to this agreement that all assignments made for the purpose of this agreement shall not be construed as a bar to the assignee's demand, proceedings or action against the debtors and/or any of the guarantor. E

The assignee here is the respondent whilst Ever Point is the assignor.

Clause 1 of the second settlement agreement goes further to elaborate what preamble (3) had expressed in general terms by limiting the period of forebearance to sue on the part of the respondent in the following manner: F

> In consequence of the assignee withholding further legal proceedings for the period of one (1) year from the date of the said agreement against the debtors and the guarantors of the debt which have been acknowledged by the debtors in the Second Schedule thereto, the assignor as beneficial owner hereby assigns ... . G

The 'said Agreement' in cl 1 is the first settlement agreement dated 22 June 1990, and one year from that date brings us to 21 June 1991. Clearly the bar to enforce the judgment sum is only good within that period of one year for after 22 June 1991, the right to enforce the judgment sum is revived. In this instance the bankruptcy notice is dated 15 January 1993 and clearly issued after the one year bar had lapsed. H

We say that our interpretation of the time bar is correct as both settlement agreements stipulate that the net proceeds from the development of the property would be available to satisfy *part* of the debts due to the respondent from a number of debtors identified in the schedules to both settlement agreements of which the appellant is one. This is clearly stated at cl 7.2 of the first settlement agreement and repeated at preamble (7) of the second settlement agreement. We were told that the property remained I

undeveloped as a housing estate and lack of funds was the cause of the appellant's continued indebtedness.

Since both settlement agreements do not have the effect of settling the judgment sum in full, we consider that cl 1 of the second settlement agreement means exactly what it expresses to say namely, that the respondent's right to obtain full satisfaction of the judgment sum would not be curtailed by the presence of the two settlement agreements. Whilst both settlement agreements provided the means whereby the appellant was able to settle part of his indebtedness to the respondent within a year, the matter was open as to how the appellant was to settle the balance due on the judgment sum. It must also be remembered that the appellant was not the sole debtor to benefit from the two settlement agreements as other debtors too had a share in the settlement of their respective debts and it is the presence of those other debtors, that we say, accounted for the appellant's indebtedness being met partly and not fully.

As a creditor it stands to reason that the respondent must be assured of its right to claim the balance of the judgment sum due from the appellant. That we say has been taken care of by cl 1 of the second settlement agreement wherein the appellant had agreed to the respondent withholding from enforcing the judgment sum for a year from the date of the first settlement agreement but after that period, the respondent was free to take any action it deemed fit to recover the balance of the judgment sum. As such during the time bar of one year, the respondent's right to enforce payment of the judgment sum had been in abeyance but once the time bar has expired, his right to go against the appellant personally is revived. Under these circumstances, the appellant cannot take any objection to the issue of the bankruptcy notice by relying on the existence of the two settlement agreements to say that he has a counterclaim against the amount demanded in the bankruptcy notice. Neither can the appellant claim that the respondent is estopped from issuing the bankruptcy notice as by agreement the appellant had consented to effect part settlement within a year and after that period the respondent was free to take any action against the appellant to recover the balance of the judgment sum.

For the reasons that appear in this judgment, we dismiss this appeal with costs and order that the deposit be paid to the respondent to account of its taxed costs.

Appeal dismissed.

Reported by Jafisah Jaafar